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M&A Nuggets: Fair Notice

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This nugget covers one of the mundane but important procedural aspects of a purchase agreement, called “Notice”. Every purchase agreement should contain a paragraph describing the methods by which written notice of a matter must be given. There may be important matters that the buyer/seller needs to notify the other about. For example, notification of the buyer’s decision to extend the closing date or the buyer’s claim for indemnification after the closing. It is therefore important that the method for providing notice be reliable enough to assure that the notice will be received and that the receiver of the notice will have enough time to respond. Boilerplate notice paragraphs often allow notice to be given by several methods, including hand-delivery, overnight mail, certified mail, fax transmission and e-mail transmission. In my opinion, neither certified mail nor fax transmission should be used as a delivery method. Certified mail, even if restricted to delivery of a specified person, is often either not retrieved or signed for by someone other than the designated person. Fax communications are used much less often than before e-mail existed and are often directed to a general fax line that may not make its way to the intended recipient. My preference is to limit the modes of delivery of the written notice to hand-delivery or overnight mail sent by a national recognized courier, along with, and not in lieu of, e-mail transmission. By being particular in drafting the notice paragraph, neither the purchaser nor the seller will risk missing an important notification from the other.